No. 7937

United States
Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of HYLAND BAG COMPANY,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY, a corporation, DUBUQUE FIRE & MARINE INSURANCE COMPANY, a corporation, NATIONAL RESERVE INSURANCE COMPANY, a corporation, MINNESOTA FIRE INSURANCE COMPANY, a corporation, FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation, THE MERCHANTS FIRE INSURANCE COMPANY, a corporation, WESTERN INSURANCE COMPANY OF AMERICA, a corporation, and NATIONAL LIBERTY INSURANCE COMPANY, a corporation,

Appellees.

Brief for Appellees Dubuque Fire & Marine Insurance Company, a corporation, National Reserve Insurance Company, a corporation, Minnesota Fire Insurance Company, a corporation, and Firemen's Insurance Company of Newark, New Jersey, a corporation.

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Authorities Cited

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On October 19, 1929 the plaintiff-appellant operated a burlap bag factory on Sacramento Street in San Francisco, and on the night of that date—a Saturday—a "set" fire occurred.

The doors and windows were securely locked and kerosene had been placed on the rear first floor, on the second floor, and on the third floor; particularly was the oil poured on the stairway at the second and third floors and the doors up the stairwell from the second to the fourth floor were all opened.

Fortunately, some of the receptacles of the kerosene became air-bound and the skylight not having been opened, there was no draft after the first flash of fire had burned out the available oxygen supply, with the result that the fire burned up the stairwell, flashed over some of the lint attached to the joists and the edges of the burlap piled near the stairway and then died in its own smoke.

Plaintiff and his confidential secretary-superintendent were the last ones in the building; all others had left by approximately 4:00 or 4:30 P. M. These two stayed there until 6 P. M. or later, according to their own admissions.

The insurance companies attempted to adjust the loss. Plaintiff, although ostensibly attempting to aid in the adjustment, did everything he could to prevent a fair adjustment. He notified competitors to give out no quotations; he refused to divulge his own cost prices; he suppressed a physical inventory that had been taken only four days prior to the fire. He forced

the use and occupancy insurance carriers into an appraisement and, by use of false testimony (as we demonstrated in the trial of this case) he secured a large award in that appraisement.

These defendants who are primary insurance carriers on the stock of merchandise demanded an appraisement. He appointed as his "competent and disinterested appraiser" a bribed employee of a competitor whom he had secretly in his pay and who would not agree to any competent disinterested umpire, and he thereby prevented an appraisement.

75% of his stock was undamaged either by water or fire. He mixed this stock, he misgraded this stock, and more than six months after the fire pretended to hold an auction sale, at which most of the stock was sold to one (company of which he had become the manager). The burlap market at that time, due to the depression, had gone down greatly in its prices.

The plaintiff had approximately $88,000.00 of merchandise, mainly burlap, in his factory at the time of the fire. He swore to a proof of loss which placed the amount of his merchandise at $102,000.00, with a loss of over $59,000.00 of damaged goods and over $15,000.00 additional "burned out of sight". Experts are agreed that it is almost impossible to burn a bale of burlap out of sight, even if the fire lasts several days. Of the loose stock of burlap sacks, which would be easier to burn, 99% were accounted for by actual inventory after the fire. Nevertheless, he sued for $76,000.00 loss and thereafter he filed an amended pleading for a

loss of $106,000.00, which latter figure he stated at the opening of his trial he would increase to $107,000.00.

The mere statement of the figures shows that there should be no wonder that the chancellor found fraud and false swearing in both the proofs of loss and the pleadings.

At the end of the trial the chancellor also found one further damning fact. He had listened to the plaintiff testifying personally, he had listened to his carefully coached and prepared witnesses, and he found that the plaintiff was guilty of false swearing during the course of the trial.

This is an equity case with, as the chancellor has phrased it in the opinion, its historic requirement that the plaintiff must come in with clean hands, and yet we find that after four years a tremendous record has been prepared and filed in this court, and a brief has been filed asking for a reversal of the finding that he was guilty of fraud and false swearing, based on a few artificial arguments on technical points! The brief is almost devoid of any statement of facts and does not pretend to state the facts fairly or what facts were in conflict in the evidence. We submit that the brief does not even have the merit of being technically correct, least of all meriting a reversal where the plaintiff has been guilty of fraud and false swearing.

The plaintiff-appellant prevented an arbitration and appraisal by his failure to appoint a competent, disinterested appraiser and by thereafter blocking the appraisal by a refusal to agree to a competent, disin-

terested umpire, and he is barred from even bringing this action, an appraisement being a condition precedent to the filing of suit (Tr. Vol. I pp. 311; 314).

The plaintiff-appellant was charged with being guilty of fraud and false swearing in his proofs of loss and in his pleadings (Tr. Vol. I p. 44). If this was true there was an end to his case because the California standard form policy provides (Tr. Vol. I p. 305):

> "This entire policy shall be void * * * (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject matter thereof, *whether before or after a loss.*"

The chancellor found that the appellant was guilty on both charges as pleaded, and in addition thereto found that the plaintiff was guilty of false swearing during the course of the trial. Unless the chancellor has committed palpable error, this court has stated that it will not interfere with such finding where it is sustained by the evidence.

> *National Reserve Insurance Company v. Scudder,* 71 Fed. 2d 884:
>
> "It would serve no useful purpose to set forth the conflicting testimony relating to payment of the mortgage, because after examination of the record, we feel bound by the well settled rule that the findings of the chancellor based on conflicting evidence, are presumptively correct and will not be set aside unless a serious mistake of fact appears (citing numerous cases)."

The trial consumed nearly three months, and the case was tried with such meticulous care that the evidence was voluminous both in testimony and in exhibits. During the course of the trial the chancellor personally visited the building and observed that the building proper was not damaged by the fire—the fire having been mainly confined to the stairwell where there was no merchandise. A few feet distant from the stairwell even the original furring on the rough joist as left by the saw at the mill was unscorched.

After the trial the chancellor devoted almost one solid month to the review of the record and to the preparation of his opinion deciding the case—Judge McCormick having been assigned to sit in his stead during that time. His opinion is lengthy and occupies thirty pages of the record (Tr. Vol. I pp. 174 to 204). The statement of the 8th Circuit Court of Appeals in

Klabe v. Lakeman, 64 Fed. (2d) 86,

is particularly appropriate:

> "The findings of fact seem to give a very clear picture of the situation. The trial court evidently gave very close attention to the facts in this case, and made a personal inspection of the property and its surroundings. * * * The findings of fact made in an equity case are, of course, not conclusive on an appellate court, but where there is conflicting evidence they are regarded as presumptively correct and will not be disturbed unless a serious mistake of fact appears. This is the rule of this court. (Citing numerous cases)."

The same rule is again stated in

Coats v. Barton, 25 Fed. (2d) 813:

> "The clear and exhaustive opinion of the court below, which occupies twenty-three pages of the record before us, evidences the care and patience with which he discharged his duty. * * * He heard the testimony and received all the evidence in this case, he enjoyed a far better opportunity than we can have to judge of the reliability of the witnesses and the truth of their statements, and it is an established rule of equity practice that, where in a suit in equity the chancellor, as in this case, has considered conflicting evidence, and made his findings and decree thereon, the presumption is that they are correct and, unless the appellant makes it clearly appear that an obvious error of law has intervened, or a serious mistake of fact has been made in the consideration and decision of the issues in the case, that adjudication will not be disturbed. (Citing numerous cases.) * * * We * * * are convinced that no influential error of law has intervened and that no serious mistake of fact was made by the chancellor below in the hearing and decision of this case and his decree must be affirmed."

We will show that the findings of the chancellor in the instant case were not only justified by the evidence, but that any other conclusion than that the appellant was guilty of fraud and false swearing could not reasonably be made in view of the overwhelming weight of the evidence showing that palpable fraud and false swearing were indulged in by the appellant.

Appellant first addresses himself in his brief to the technical contention that the findings and decree of the trial court are not in accordance with Equity Rule 70½. He pretends to believe that he cannot tell what the findings of the court are and argues that the findings of fact are not clearly and distinctly stated. As he gives this the preferred and important position in his brief we will answer it first.

I.

THE OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE OF THE TRIAL COURT ARE IN ACCORDANCE WITH THE RULES PRESCRIBED IN EQUITY AS APPROVED BY THIS COURT.

The opinion of the trial court (reported at 58 Fed. (2d) 1003) (Tr. Vol. I p. 174) was adopted by the chancellor as his findings of fact and conclusions of law, citing as his authority for so doing the decision of this court in *Parker v. St. Sure,* 53 Fed. (2d) 709, where the same objection was raised and a mandamus was sought to compel more specific findings than contained in the opinion. This court there said:

> "It is not necessary to make findings on all defenses wherein findings actually made require a judgment in favor of either party. We do not believe that the Supreme Court intended to extend this rule by Equity Rule No. 70½ so that in every case there must be specific findings upon every issue, regardless of the fact that findings actually made sustain a decree, nor do we believe

> that it was the intention of the Supreme Court to introduce in equity and admiralty practice the difficulties inherent in the preparation of precise findings upon every material issue involved in the litigation. * * *
>
> In these cases the District Court filed an opinion and adopted the same as its findings of fact and conclusions of law. We see no objection to this course. * * * We are not in this case facing an entire absence of findings. We are also of opinion that the findings in question are sufficient."

This court further said in the later case of *National Reserve Insurance Co. v. Scudder,* supra (p. 888):

> "We think the mere fact that the findings and conclusions—if sufficiently specific and otherwise in compliance with the rules—are set forth in the court's written opinion and adopted by the court as such findings and conclusions, is not such a violation of the rule as calls for a reversal of the decree. * * * In the instant case we think the findings and conclusions on material issues substantially comply with the rule."

The opinion of the trial court in the instant case contained findings upon all of the material issues necessary to determine that plaintiff-appellant herein was without right of recovery. The opinion of the chancellor need only be condensed to its findings to see that it complies entirely with the above rule laid down by this court.

CHANCELLOR'S OPINION CONDENSED TO SHOW SUCCINTLY THE FINDINGS OF FACT.

(The language of the opinion is quoted verbatim; number designation only being added.)

(*A*) *The Issues:*

(1) "All defendants plead certain special defenses which may be grouped under two heads: First, that plaintiff swore falsely as to his knowledge and belief as to the origin of the fire;

(2) And second, that plaintiff was guilty of fraud and false swearing in connection with his proofs of loss and claims of loss in the pleadings in this action.

(3) The five companies writing the $50,000.00 of insurance plead the additional defense that an appraisement of the loss was not had under the terms of the policy due to the acts of plaintiff.

(4) The Western pleads the additional defense that its policy is for damage in excess of $50,000.00 and that the loss was less than that amount.

(5) The National Liberty, in accordance with its prayer for reformation, pleads that it is only liable if values were in excess of $100,000.00 and for damages in excess of $100,000.00."

(*B*) *Finding of Fact:*

(1) "Considering the first defense, the evidence clearly shows that this was a 'set' fire and that plaintiff knew it when making his proof of loss. (Tr. Vol. I p. 175)".

"The policy required the assured to state in the proof of loss his knowledge and belief as to the origin of the fire. Plaintiff stated therein that

the origin of the fire was unknown to him. * * *" (Tr. Vol. I p. 179).

(2) "The principal defense relied upon by all of the defendants was that plaintiff was guilty of fraud and false swearing when making his claim as to the extent of his loss. * * * It is set up in the separate defenses that there was fraud and false swearing,

First, in making proof of loss in the sum of $73,601.96;

Second, in claiming loss in the sum of $76,498.62 in the original complaint in this action; and

Third, in claiming loss in the sum of $106,992.83 in the amended complaint.

Finally, (fourth), it is claimed in the argument that plaintiff's right to recover is further barred by his false swearing during the trial of this case." (Tr. Vol. I pp. 179-80).

(3) "I find the value of the stock at the time of the fire was approximately $88,000.00". (Tr. Vol. I p. 178).

"The evidence in this case shows that the overvaluation resulted from no such inadvertence but from an intentionally fraudulent attempt to get an excessive award from the insurance companies. (1) The values in the original proof of loss were padded; (2) they were padded in the several pleadings filed in this case; and (3) in the attempted proof at the trial". (Tr. Vol. I p. 180).

"I believe the evidence shows * * * (1) that plaintiff knew what was in his factory, and (2) that his claim of loss was overvalued; (3) in any event, under the circumstances of this case the knowledge of his agent would be imputed to him". (Tr. Vol. I p. 181).

(4) "Unless large quantities were burned out of sight, plaintiff's claims are so excessive as to be false and fraudulent."

(a) "By stock burned out of sight I mean merchandise which has been burned to an ash or into such small particles that it might be washed away by streams of water or swept into the debris. Merchandise is not burned out of sight when it may be identified as to quality and approximate previous quantity". (Tr. Vol. I p. 182).

"It is difficult to burn burlap when piled or baled. If baled it is practically impossible to burn it out of sight". (Tr. Vol. I p. 183).

"No great damage was done to the building or to the machinery". (Tr. Vol. I p. 183).

"At the end of twenty minutes all but four of the companies were sent away. The water tower never went into action. * * * From the evidence as to the extent of damage to the building one would infer that the damage to the stock would not be great. The testimony of the chiefs was that the fire in the stock was not extensive and that probably none was obliterated by fire. * * * If it was necessary to determine the amount of the out of sight loss I should find that it was the difference between the perpetual inventory kept

by plaintiff as of the date of the fire and the merchandise removed after the fire and counted by Radford, or approximately the sum of $2,000.00". (Tr. Vol. I pp. 184-5).

(b) "Much of the merchandise in the factory was undamaged by fire, water or smoke. * * * As to the quantity and character of the debris there is serious conflict of testimony. * * * It is incredible that the debris consisted to any large extent of ash or stock burned beyond recognition". (Tr. Vol. I p. 185).

(5) (a) "We find that the books show a value at the factory of $89,383.00. Strikingly similar is the value shown by the perpetual inventory or summary of stock sheets kept by Taylor, plaintiff's accountant. Taylor denied ever having had such a document. * * * A summary was made of it by Mr. Hart. * * * And it is from his work-sheet that we know the total of $88,272.55, only $1111.00 less than the book values. * * * The proof of loss based on Radford's account made after the fire shows values at the factory after the fire of $86,816.00". (Tr. Vol. I pp. 186-7).

"Reference has been made to Radford's account or inventory. He was employed * * * to inventory all of the stock in the factory after the fire which could be identified in order that its pre-fire value could be fixed. * * *

(b) "The fraudulent padding commenced with the pricing and grading of this inventory. * * * Radford was not a burlap man and had one of plaintiff's employees give him the grades of the stock. Taylor, who priced the inventory,

admitted on cross-examination that he knew that the grades were raised and that there were no such quantity of certain high grades of burlap in the factory at the time and that the mistake in grading added some $6,000.00 to the values. * * * The evidence shows that Radford was either deliberately misled as to grades or that the mistake was permitted to remain with full knowledge that it was there". (Tr. Vol. I pp. 187-8).

(c) "There was a deliberate deception as to price. The inventory was priced according to the Bemis so-called large quantity price list. This was actually a retail price list for use by the Bemis Company's salesmen". (Tr. Vol. I p. 188).

(d) "Not only did plaintiff use the retail price, but he attempted to suppress quotations as to price from other dealers and succeeded in suppressing them and withheld information as to his own costs". (Tr. Vol. I p. 189).

(e) "Plaintiff first testified that the inventory had been priced at landed cost but admitted under cross-examination that this Bemis price list was used. Plaintiff's adjuster testified that the matter of replacement values was left to plaintiff who was, according to his own testimony and that of others, a shrewd buyer and knew burlap prices thoroughly. He nevertheless used a price from two to four cents a yard higher than the prices at which he could have replaced his materials". (Tr. Vol. I p. 189).

(6) (a) "Plaintiff's original claim of loss was predicated upon values in the factory before the

fire of $102,453.23. Deducting from this the valuation of Radford's inventory of $86,807.98, the out of sight loss was claimed to be $15,645.25. * * * The total valuation was based upon the first Hood & Strong report prepared in late November 1929. This report was based on data flagrantly insufficient.

(1) Plaintiff failed to give the accountant an inventory and balance sheet prepared by Ernst & Ernst as of May 31, 1929, which according to accounting practice should have been the starting point of the calculations,

(2) the perpetual inventory kept by Taylor,

(3) and certain physical inventories taken shortly before the fire. * * * What I have said * * * establishes that the claim of $15,000.00 worth of goods obliterated as well as a subsequent claim for a larger amount were alike fraudulently excessive". (Tr. Vol. I pp. 190-1).

(b) "There was lack of good faith in fixing the proportion of loss on the salvaged goods * * * disinterested witnesses have testified that this merchandise was damaged not in excess of 25%. Yet a loss of $53,586 was claimed in this". (Tr. Vol. I p. 191).

(7) "The amended complaint in this action and the additional claims advanced at the trial are based upon the second Hood & Strong report and supplements thereto. * * *

(a) Defendant has established that at least $41,361.12 should be deducted from the values claimed because of duplications. * * *

(b) The claim of approximately $46,000.00 in merchandise values burned out of sight is largely accounted for by demonstrated duplications amounting to more than $41,000.00". (Tr. Vol. I pp. 191-2-3).

(8) "In connection with the contents of the building before the fire, examination must be made of plaintiff's testimony at the use and occupancy hearing as to the contents of the second floor. * * * He had there testified with some particularity that prior to the fire the second floor was filled with merchandise and in general described the quantity and type. In the course of his cross-examination he in effect adopted the testimony given at that hearing. * * *" (Tr. Vol. I pp. 193-4).

(a) "The evidence is therefore properly admissible to impeach the plaintiff.

(b) It is further admissible generally as proof of another fraud or fraudulent representation of the same character committed at or near the same time to show intent or knowledge. * * *

(c) His padding of values at that hearing and his conduct with reference to the claims of loss involved in this case warrant the inference that the frauds are part of a general scheme or purpose to defraud". (Tr. Vol. I p. 195).

(d) "The quantities of merchandise which plaintiff testified were on the second floor of the factory at the U. & O. hearing were greatly exaggerated. Defendants have prepared an exhibit to demonstrate the physical impossibility of the truth of this testimony. * * * All estimates of

quantity are but approximations but the one in question is so far removed from the possible contents that it is incredible that a man in plaintiff's position should have offered it in good faith". (Tr. Vol. I pp. 195-6).

(9) "The policies in question provided that if the company and the insured failed to agree as to the amount of the loss, the company may demand an appraisement. Each party shall name a competent and disinterested appraiser and they shall in turn select an umpire. * * * It is contended that the failure to agree upon the appointment of an umpire and to reach an appraisement is due to the fact that Colbert, who was apointed by plaintiff as his appraiser, was not disinterested. * * *

(a) The vice in appointing Colbert lay in the fact that his connection with plaintiff was secret and tainted with fraud. * * *

(b) Plaintiff was a large customer of Colbert's employers and his business interests were adverse to theirs but plaintiff nevertheless had Colbert in his pay. * * *

(c) These entries have not been satisfactorily explained by plaintiff, and his own records, therefore, show that the man he appointed as an appraiser was in fact a bribed employee of a firm with which he had extensive dealings. * * *

(d) Not only was Colbert induced by plaintiff to betray the interests of his emyloyer, but the evidence shows that plaintiff used Colbert as a tool in his attempt to get an excessive award for his loss at the U. & O. hearing. This was attempted by the use of the so-called fictitious

Newhall contracts. A month or two after the fire Colbert furnished plaintiff, at the latter's request, with contract blanks of the Newhall Company and plaintiff filled them out as to quantities, description and prices, Colbert stamping or signing the contracts and checking the prices to ascertain that they were approximately correct. These contracts called for the delivery of some 2,400,000 yards of material at a cost of $185,325.00. * * * (Tr. Vol. I pp. 198-9).

(e) Plaintiff contends that they were actual contracts; Colbert testified that they were made up to be cancelled and were cancelled. * * * The records of Newhall Co. show that they were unquestionably fictitious. In the face of the evidence, plaintiff's contention that these contracts were valid is incredible". (Tr. Vol. I p. 199).

(f) Colbert testified * * * after the commencement of this trial plaintiff approached him saying the prices on these contracts were too low and asked him to negotiate new contracts to be substituted for them. Colbert supplied him with new blanks, the contracts were made up, were signed and cancelled in Colbert's presence and taken away by plaintiff. I believe Colbert's testimony as to this transaction". (Tr. Vol. I pp. 199-200).

(10) "The incident of the fictitious contracts, in line with many others discussed in the course of this opinion certainly shows bad faith on the part of plaintiff, and the evidence suggests that plaintiff is responsible for the failure to settle the loss by arbitration.

(a) The admission of the evidence as to these fictitious contracts has been objected to by plain-

tiff. This evidence is properly admissible upon three grounds:

First, it is admissible to characterize the relationship between plaintiff and the appraiser appointed by him and show the appraiser was not only not a disinterested one, but that he was fully cooperating with plaintiff in his fraudulent scheme. If plaintiff did not want a settlement of the loss by arbitration, his appraiser could be counted upon to block it.

Second, it is admissible as evidence of a substantially contemporaneous fraudulent act of plaintiff for the same reason and upon the same authority that plaintiff's testimony at the U. & O. hearing was admissible. * * *

Third, like the testimony at the U. & O. hearing it is also admissible to impeach plaintiff. Plaintiff testified as to the price of burlap on his direct examination and gave prices materially higher than those called for by the contracts. * * * These contracts called for deliveries during October and November, and, had they not been cancelled, and were actual contracts, would have enabled plaintiff to replace all of the materials of that type which he claimed had been destroyed with the burlap covered by these contracts.

Fourth, furthermore, the prices varied but slightly from the prices given by experts called by defendant and corroborated their figures. The evidence is relevant to the question of price and it was proper to use them to impeach plaintiff's testimony on that point". (Tr. Vol. I pp. 200-201).

(11) The whole course of Colbert's dealing with the appraiser appointed by the insurance companies was designed to defeat an appraisement of the loss according to the terms of the policy. * * * Finally, a man was agreed upon by the appraisers who is an expert in the burlap business and who is conceded to be a man of unquestioned fairness and integrity. * * * When Colbert discovered that he believed a substantial out of sight loss was impossible, he (Colbert) suggested that he decline to serve as umpire". (Tr. Vol. I p. 202).

(a) "* * * I believe that a loss of this type should be settled by arbitration. * * * Due to the conduct of plaintiff and his appraiser this was not done and this suit was instituted". (Tr. Vol. I p. 202).

(b) "Compliance with the arbitration clauses in these policies is a condition precedent to a suit upon the policy". (Tr. Vol. I p. 197).

(12) "I have discussed with some detail the evidence which I believe supports my finding that plaintiff was guilty of

1. Fraud and false swearing in connection with his proofs of loss,
2. and the pleadings
3. and testimony in this case,
4. and that his conduct has barred his right of recovery herein". (Tr. Vol. I p. 203).

In the face of these specific findings of the court, the claim of appellent that he cannot determine there-

from wherein he is found to be guilty of fraud and false swearing is both ridiculous and pitiful. From these findings it appears that the appellant planned and executed a definite scheme for his unjust enrichment by reason of the fire which fire was, as the court finds, known to appellant to be a "set" fire. The burlap trade is a restricted trade, there being only a few dealers in the wholesale trade, and the court finds that the appellant suppressed quotations of prices from other dealers and also suppressed his own costs for the goods on hand.

He next, so the court finds, by his own employees graded the merchandise being inventoried, and these employees misgraded the merchandise to a higher grade.

The court then finds that plaintiff had his accountant price this merchandise, and this accountant admits that in pricing the merchandise for the higher grades thus given in the inventory he knew that there were no such amounts of those grades of merchandise in the house. No suggestion is made by appellant why these employees should have done such a dishonest thing except at the direction of the appellant.

Furthermore, the appellant admitted, and it is so found that, although he was an expert on pricing merchandise, that he did not use his own costs but took a retail price list published by a competitor for the use of their own salesmen and added to that his overhead expenses, with the final result that he knowingly and consciously swore to a proof of loss that was from two

to four cents a yard higher than the merchandise cost him. As the price per yard mostly ran between six and ten cents per yard, it results that the valuation placed on the goods by plaintiff had a tremendous error in percentage and amount.

Furthermore, the finding is that he deceived the certified public accountant whom he called in to purportedly audit his books. He had a perpetual inventory kept by his accountant which he suppressed and later refused to produce at the trial—even denying its existence, although several witnesses testified to its existence. He suppressed the physical inventory taken October 15, four days before the fire. An inventory had been taken by another firm of accountants on May 31, 1929, and when he called in the second firm of accountants after the fire they not only did not have the benefit of the perpetual inventory and other physical inventories taken just before the fire but he secured a duplication of over $41,000.00 in his stock by changing the dates on the stock cards that had already been inventoried by the prior firm of accountants on May 31st. The dates on these cards were changed from prior to May 31st to June of 1929 and this stock was then counted by the new accountants as stock received after the prior inventory.

The attempt of appellant to claim that this was not his doings but was merely the mistakes of his accountants is, as the chancellor says in his findings, "incredible". The chancellor has found that the goods on hand at the time of the fire was $88,000.00 and that 75% of this stock was not damaged by fire and

that $2,000.00 was all that was burned out of sight. In other words, of the damaged and burned out of sight stock there was only $22,000.00, less any salvage that could be obtained for the damaged stock. The loss therefore was, and was well known to the plaintiff to be, less than $22,000.00. In his very first sworn proof he claimed $53,586.00 loss on salvaged stock, $6,000.00 more on miscellaneous merchandise and $15,000.00 for stock burned out of sight. No wonder the trial court found that no such claim could be made in good faith and without the plaintiff knowing that he was swearing to that which was false. It was, as the chancellor termed it, "incredible" that plaintiff could have been acting in good faith.

In the amended complaint, after "values" had been built up by palming off altered records on his accountants, he swore to a loss of $106,000.00 in spite of the fact that he knew that the total amount of merchandise in his factory was approximately $88,000.00 and that 75% of that was not damaged.

Plaintiff's attempt to explain away the facts and the judgment against him in this case by urging a technical objection to the findings and decree does not even have the merit of being based upon a good technical objection. As we have shown above, it is demonstrably in error.

II.

PLAINTIFF IS NOT ENTITLED TO RECOVER BECAUSE HIS POLICIES WERE VOIDED BY HIS FRAUD AND FALSE SWEARING.

We shall show hereinafter that the evidence overwhelmingly demonstrates plaintiff was guilty of fraud and false swearing—in his proofs of loss, in his pleadings, and at the trial. The policy of insurance provided (Tr. Vol. I p. 305) that the entire policy shall be void if the insured is guilty of fraud or false swearing touching any matter relating to his insurance or the subject matter thereof, whether before or after a loss. This provision has been wholeheartedly supported by the courts. It not only is entitled to support because it is a valid contract between the parties, but it is the policy form provided by law, and is entitled to support because it represents a sound public policy. Among the many cases which might be cited we will cite the following, most of which were cited by the chancellor in his opinion:

Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 S. Ct. 507, 28 Law Ed. 76;

Columbian Ins. Company v. Modern Laundry, Inc. (C. C. A. 8) 277 F. 355, 360, 20 A. L. R. 1159;

Atlas Assurance Co., Ltd. v. Hurst (C. C. A. 8) 11 F. (2d) 250;

Mazzella v. Hanover Fire Ins. Co., 174 S. E. 521;

Follett v. Standard Fire Ins. Co., 77 N. H. 457, 92 A. 956;

Liberty Tea Co. v. LaSalle Fire Ins. Co. (Wis.) 238 N. W. 399.

In the *Claflin case,* supra, the Supreme Court said:

> "A false answer as to any matter of fact material to the inquiry knowingly and wilfully made with intent to deceive the insurer would be fraudulent. If it accomplished this result, it would be a fraud effected; if it failed it would be a fraud attempted. * * * No one can be permitted to say, in respect to his own statements upon a material fact, that he did not expect to be believed."

In the *Columbian Insurance Co. case,* supra, Justice Sanborn, speaking for the court, said:

> "Where the insured knowingly and wilfully makes a false statement of or regarding a material fact in its proof of loss, or in its testimony regarding the value of the property insured, or the loss or damage thereto by fire, the intention to deceive the insurer is necessarily implied as the natural consequence of such act."

The findings of fact are really more detailed than was necessary. The chancellor need only have made his finding that the plaintiff was guilty of fraud and false swearing. It was not necessary that he make many other findings on issues raised, but he did so. However, having explicitly found that the plaintiff was guilty of fraud and false swearing in his proofs of loss, in his pleadings and at the trial, there was an end to plaintiff's case.

Parker v. St. Sure, 53 Fed. (2d) 709.

III.

PLAINTIFF INTENTIONALLY SWORE FALSELY AS TO THE GENERAL DAMAGE DONE TO THE BUILDING, MACHINERY AND STOCK OF MERCHANDISE AS A "BACKGROUND" FOR HIS CLAIM OF A LARGE LOSS ON HIS STOCK.

To show that great damage had been done to his stock plaintiff testified specifically to the tremendous amount of damage done by the fire to the building, to the machinery in the building, and to the stock. He testified in greatest detail about all of these facts —to the damage caused by fire and water—particularly to the great amount of stock that was burned (Vol. I p. 466 et seq.) These details included stock that was partly burned and also to a great amount of ashes present.

In order to make out a large claim of damage to his merchandise stored in the basement, where it is conceded there was no fire, plaintiff testified that there was from 18 to 24 inches of water in the basement immediately after the fire (Tr. Vol. I p. 466). Such an amount of water in a large basement would constitute a miniature lake of tens of thousands of gallons. It is directly contrary to the testimony of all disinterested witnesses, as we shall show.

On the other hand, he had a poor memory for anything that he considered detrimental. He denied that he smelled kerosene (Vol. I p. 464), he denied that kerosene was called to his attention by the Fire Marshal (Vol. I p. 480), he denied seeing either of two drums of kerosene on the third floor, and denied even

seeing a pan filled with kerosene on the second floor (Vol. I p. 490). He admitted that Sullivan, Assistant Fire Marshal, called his attention to "some pans there" (Vol. I p. 490):

"Q. And that is all?
A. That is all.
Q. You are quite positive of that?
A. Quite positive."

He finally admitted (p. 494) that the Fire Marshal did call his attention to the kerosene but "I did not detect any odor of kerosene there at all". Again he stated (p. 495):

"I didn't smell any coal oil and didn't tell him that I smelled any, nor did I tell him that I saw any."

He further positively testified that he never accused anyone of having set the fire or that he thought the fire must have been set (Tr. Vol. VI pp. 3243-4).

We will show by quotations from the testimony of disinterested witnesses that this testimony is absolutely false.

First, as to the extent of the fire. In addition to testimony by various witnesses having to do with the adjustment of the loss, there were numerous witnesses who testified as to the extent of the fire. We will particularly call the court's attention to the testimony of Chief O'Neill and Chief Mahoney of the Fire Department, of Fire Marshal Kelly and Assistant Fire Marshal Sullivan, and of Lieutenant McCarthy,

George C. Lee, William Lee, H. Payton of the Underwriters Patrol.

Chief O'Neill, who was there within two minutes after the alarm was sounded (Vol. IV p. 1830) immediately went up the side of the building to the top, looking at each floor as he went by. He had the skylight broken in in order to give a vent out of the top, or fourth floor. There was some smoke there but no flame, but he later saw some in the stairway. He then went to the third floor where they "killed" the fire in five minutes and thereupon closed the nozzle and simply watered down the smudged ends of bales (p. 1834). By that time he received word that the fourth floor was also under control so he stopped the water tower from even going into service (p. 1835): "The water tower never used a drop of water". And he immediately ordered all fire companies to return to their stations except one company for each floor to overhaul the burlap. They overhauled the fourth floor in fifteen minutes and he sent Chief Mahoney home. He estimated the length of the fire as follows (p. 1836):

> "Twenty minutes on the top floor for the last places of living fire, or visible fire, fifteen minutes on the third floor, less than ten minutes on the second floor, and possibly three-quarters of an hour on the mezzanine and first floor."

He testified (p. 1838) that the fire was a "flash fire", which meant that it flashed over lint and burned the lint to a black carbon. It did not burn the burlap.

Two bales of burlap on the second floor had caught fire and these were put out. He was asked (p. 1840):

"Were there any ashes there which indicated that any stock there had been obliterated?
A. No."

And again (p. 1841):

"I did not find any accumulation of ashes there indicating that the stock had been burned out of sight and obliterated. * * *"

On the first floor (p. 1841):

"As far as the stock being burned out of sight in there, it was not either. No, there was not any stock burned out of sight there."

On p. 1842 he states:

"On the second floor and on the third floor * * * there was a trail of kerosene and in picking the grease spot up it was still alive. You could see the kerosene on your hand and also smell it, and the smell of kerosene or the odor of kerosene was quite prevalent at that third floor."

On p. 1848 he states:

"Well I would say it took fifteen minutes to overhaul the third floor and ten minutes for the second floor. As to what would that indicate to me relative to whether or not that fire had gotten a deep-seated hold in the stock, for example, the Pacific Bag Factory, a building with almost like occupancy, and the Nottson Factory, on Clay Street, a fire which I handled on both occasions; in the Pacific Bag Factory it took over 18 hours

to overhaul and a watch line on it for over one week, and the Nottson took us eleven hours to overhaul and a watch line for some fourteen hours after that."

And, finally (p. 1849):

"*It was the fastest stopped fire that I have ever seen in my life in an occupancy of that sort.* Answering your question directly, *the damage was to the stairwell proper,* a part of the partition in the rear of the first floor, a hole in the first floor, several holes where we had to chop through to let water down to take the weight off of the floor. * * * No, *there was not enough ashes that it necessitated the removal of them.* 'If there had been any large quantity of stock burned up what would you (we) have done?' Remove it to the street. No, we did not have to remove any to the street."

Chief Mahoney testified that he felt of the glass of the second floor window as he went up the building and it was cold. It was not even warm (Tr. Vol. IV p. 1891). He estimated the length of the fire from twenty to thirty minutes (p. 1892). He testified that he particularly worked on the fourth floor. That there was none of the stock burned out of sight. (Tr. p. 1893):

"I couldn't say that I did find any of it that was obliterated and reduced to ashes. As to 'was there any of the stock there but what could be identified?' Well, *I would say that it all could be identified,* possibly there might be a sack or two on the top of the bales, there would not be very many loose bales, a few of them there, *but the bales themselves they stood there intact.*"

On p. 1895 he stated:

"Q. Was this a difficult fire to control and extinguish?

A. No, I would not say it was. It was extinguished rapidly, quickly I mean.

Q. Was it difficult to overhaul this stock?

A. No."

Assistant Fire Marshal Captain Sullivan who was also head of the Fire Patrol testified that the men of the Patrol covered the stock immediately to protect them from fire and water (Vol. IV p. 1909); that he smelled coal oil as soon as he came into the building. He took Hyland to the coal oil and (p. 1911):

"I said, 'Smell this then', so I took the rubbish * * * small pieces of sack and burlap and let him smell it with his nose, and he said, 'There is coal oil there', and I said, 'Of course there is.'"

On p. 1912 Sullivan states:

"I went over all the building looking out for the different fires, and machinery and everything to see that they were covered in case there was any water, the fire was all on the stairway."

Again, p. 1915:

"Q. Was there any stock that was burned into ashes in this fire?

A. There were no ashes there at all.

Q. Did you have any ashes to throw into the street?

A. Absolutely none, we didn't throw anything in the street the night of the fire because there

was none there. * * * If there were ashes we would have to pick them up and throw them in the street."

Sullivan stated that there was no water in the basement except at the low place in the rear end (Tr. p. 1915):

"There was about two inches of water back there that was in that southwest corner. They took it up in buckets, I ordered them to do so. No, we did not use the pumps on the building, we have got two great big pumps, one pump about 1600 gallons and one 200 and we did not bring them to the fire, we did not even use them, we had no use for them."

He discussed with Hyland who set the fire (p. 1916):

"I asked him who he thought done it and *he said he thought it was burglars.* * * * And I said, 'There was no burglars in the thing, no way of getting in that building, your windows and doors were locked and the firemen had to break them down to get in here.' "

Fire Marshal Kelly of San Francisco testified that he was not at the fire on Saturday but was there on the 21st of October—the Monday morning—following it. He had photographs taken, which are defendants' exhibits C to I. He described the condition of the damage to the stairwell and the fact that the fire was confined mainly to the stairwell and to a smudge fire on the mezzanine floor (Vol. IV pp. 1962 et seq.).

That there was no connection between the smudge in the mezzanine floor and the fire up the stairwell from the second to the fourth floor. The mezzanine door was closed (Tr. Vol. IV p. 1966). That the fire in the stairwell from the 2nd to the 4th floor scorched the inside of the stairwell equally both top and bottom due to the fact that it was not burning in the wood but was a gas burning from the kerosene. That there was a strong odor of kerosene which he could still detect two days after the fire (p. 1969).

He testified that it was almost impossible to burn a bale of burlap. That you would have to have an outside fire kept up to do it. That at the Pacific Bag fire the premises had burned out and there were hundreds of bales that fell through the floors to the basement and they were not burned beyond recognition. That you could cover a bale with kerosene and you could not burn it beyond recognition. That the stairwell burned in the instant case because it acted like a funnel while the oxygen lasted (pp. 1974-5). He then testified to the kerosene on the second and third floors and of some scorch damage to edges of burlap piled near the stairwell, as also on the fourth floor (pp. 1978-81).

He discussed the fire with the plaintiff Hyland and informed him it was an incendiary fire (p. 1983):

> "Mr. Hyland then told me that some two months previous to this fire the building had been burglarized. * * * Mr. Hyland told me at that particular time that he suspected three former

> employees of the plant. * * * I asked him why he would suspect these three people, owing to the fact that quite a length of time had elapsed between the time they were under his employ. * * * Mr. Hyland was emphatic in his accusation and we took the names of the suspects."

Inspector Kelleher was assigned to the case, so Kelly states (p. 1984):

> "Inspector Kelleher and myself then returned to Mr. Hyland's place of business, and Mr. Hyland * * * repeated the conversations which he had told me some few hours previous. * * *"

He then states how the three men whom Hyland accused of setting the fire showed that they had no connection with it in any manner (Tr. pp. 1984-5). After this

> "Mr. Hyland still felt that the three people were the ones that had started the fire." (Tr. p. 1985).

The various Patrol men who testified confirmed the testimony heretofore related, that the damage to the building and stock was very minor and no stock burned out of sight, no water pumped out of the basement, and no debris or ashes removed to the street on account of the fire. See: W. Lee, Vol. IV p. 2268; McCarthy, Vol. IV p. 2260; Lee, Vol. IV p. 2272; Payton, Vol. IV p. 2286.

The testimony of these witnesses who were disinterested shows that the testimony of Hyland that he

didn't know the fire was incendiary, that he smelled no kerosene, that there was $15,000.00 (later increased to $46,000.00) of stock burned out of sight was false, and that he knew it was false when he swore to his proof of loss and later to his pleadings, and later as testimony in the trial of this case.

IV.

PLAINTIFF KNEW THAT HE WAS SWEARING FALSELY AS TO THE VALUES OF HIS MERCHANDISE AND THE AMOUNT OF HIS LOSS IN HIS PROOFS OF LOSS, IN HIS PLEADINGS AND AT THE TRIAL, AND HE KNEW THAT HIS AGENTS AND EMPLOYEES PREPARED FALSE STATEMENTS OF VALUES WHICH HE SIGNED.

Appellant Hyland had a personal business which he had built up under his own name. He was fully cognizant of the details of this business. He had his office right in his factory and he personally did all of the buying of raw materials and personally sold all of his finished products. (Tr. Vol II p. 575). He prepared and was familiar with the various forms used (Tr. Vol. I pp. 266 et seq.).

After having thoroughly established this fact he has attempted, in order to escape the charge of fraud and false swearing, to claim that his books were not accurate, that they did not show the amount of stock he had, that he did not know how much stock he had on hand, and that he relied for these things entirely upon his employees, and that if there is anything wrong it was the fault of the employees.

We will later show that this is quite immaterial because the plaintiff was in daily contact with his employees and directed their work and under such circumstances he is bound by acts of his employees and agents.

But the claim of plaintiff cannot be believed. In Vol. I p. 441 he admitted that his statements concerning figures were based on his personal knowledge.

> "Yes, it is based on my personal knowledge. I have studied this case quite thoroughly recently. No, not exactly for the past two years; I have had other occupations. Yes, I have made notations from various reports of auditors, from which I have been testifying, and *which of course, I may add, I know to be correct from my own personal investigation.*"

Not the slightest excuse was given for the change of dates on the inventory stock cards which caused a duplication of merchandise of over $41,000.00 One stock card was changed from April 1929 to June 1929. The other was changed from May 20, 1929 to June 20, 1929 (Tr. Vol. III pp. 1463-4). The contents of both cards were contained in the inventory of Ernst & Ernst of May 29, 1929 (last one being the next in order stock card #2199 (Tr. Vol. III p. 1488)) and were then again counted by Hood & Strong as goods received after May 31, 1929. Not the slightest explanation is given why anyone in the employ of Hyland should have wilfully done such a thing except at the direction of Hyland.

The grading of the merchandise was done by two employees of Hyland's, and it was misgraded to a *higher* grade. Ledgett admitted that he graded the quality of the merchandise in the Green Street warehouse (Tr. Vol. II p. 684). Kraus graded it at the factory (Tr. Vol. II p. 795). Kraus admitted that an expert in burlap can tell exactly the difference in grade and the correct grade.

Taylor testified that he priced this misgraded inventory knowing that there were no such grades in the factory or at least no such quantity of such grades in the factory, and that he did it because he was told to price them thus (Tr. Vol. III pp. 1450, 1455, 1529).

Plaintiff swore that the prices in his proof were those of landed cost (Tr. Vol. I p. 527):

> "The prices set forth in that proof of loss represented our actual cost to the best of my recollection. That is the best of my belief."

On cross examination he admitted that he used the Bemis 5 bale retail price as supplied to their salesman and that he had even added overhead cost to that price (Tr. Vol. II pp. 576-9). (See also Tr. Vol. III pp. 1530-1.)

Plaintiff, however, testified that he was not familiar with the schedule attached to his proof of loss (Tr. Vol. I p. 442), that he did not know about the values that were placed on those goods (p. 446), that while he thought his accountant, Taylor, did keep a perpetual inventory he had never seen such an inven-

tory except that in the course of years he might have casually seen it, and that it was not produced or referred to when Adjuster Smith demanded it in his presence (p. 447). He denied that his accountant, Taylor, stated that his perpetual inventory showed approximately $90,000.00 in the presence of Adjuster Smith and himself (p. 509). He admitted that a perpetual inventory was kept and that actual physical inventory was taken twice a month but that he never personally had anything to do with it (p. 499). He swore that he wasn't familiar with the schedule of his proof of loss, stating (p. 446):

> "That schedule had been prepared as I advised you before by Mr. Ben Sugarman and by our accountant Mr. George P. Taylor. * * * I was not thoroughly familiar with the Radford inventory, I had looked it over just casually. * * * I don't know about the values that were placed on those goods we had been discussing."

He denied that Adjuster Smith asked to see his books (p. 500). He stated (p. 508):

> "Q. And you had never been informed of the fact that there was a perpetual inventory at Sacramento Street which at your own valuation showed but $88,000.00 on hand on October 19, 1929?
>
> A. That is correct."

Tr. page 510:

> "Q. Do you remember shortly before the 24th of December that you were in the office of R. V. Smith with Ben Sugarman, Warner Grove also

being present, and you stated that the total value at Sacramento Street was $102,000.00 and some odd; that Mr. Smith stated to you that your own books showed it was a little over $88,000.00 and that you turned to the telephone and called up Mr. Taylor and then stated to Mr. Smith that Mr. Taylor's figures were $88,252.50?

A. I don't remember any such conversation."

On page 499 he states as to the physical inventory taken twice a month (the fire occurred October 19th):

"I cannot say positively whether or not there was a physical inventory taken at Sacramento Street on the 15th day of October."

At page 513 he testified as follows:

"Mr. Taylor and Mr. Ledgett make physical inventories twice a month at both Sacramento Street and at Sansome Street. Reports of these inventories were presented to me in condensed form by Mr. Taylor. * * * *Such a condensed report was given to me showing the total merchandise on hand at Sacramento Street on October 15, 1929.* As to whether any of these reports were used in preparing our proof of loss I don't know, I had nothing whatever to do with it. Answering your question why, if we had such records, did we employ Hood & Strong, my reason for employing Hood & Strong was that I wanted to be absolutely certain beyond any possible doubt that the amount we had claimed was correct."

Not only are these statements contradictory in and of themselves and demonstrate by his own mouth the

falsity of his testimony, but other evidence also fully confirms its falseness.

Radford, who inventoried every piece of merchandise immediately following the fire, saw the perpetual inventory, checked his inventory with Taylor and ascertained that he had the complete amount supposed to be on hand per the perpetual inventory. He stated (Tr. Vol. V p. 2521):

> "I made this check at various times with Mr. Taylor and Mr. Ledgett to ascertain if I had removed the entire lots of any particular kind of merchandise. * * * I would ask him or he would tell me—he would refer to his stock sheets or perpetual inventory and tell me how many bales there were supposed to be in that particular lot and in that way I would know that I had removed that complete lot."

And (p. 2531) Taylor told him that his inventory was accurate with the exception of a few bags. And again (Tr. Vol. V p. 2605):

> "The only statement he made to me was after I had given him a copy of the inventory was that we were only a few bags off."

Adjuster R. V. Smith testified (Tr. Vol. V p. 2622) that Taylor told him the day after the fire that the merchandise was less than $100,000.00, between $90,000 and $100,000. That he had an inventory which he kept perpetually and that he kept it up to date at all times. On the Monday following (p. 2627) he asked Hyland for information so he could estimate the loss, and Hyland stated that Taylor

"keeps a very accurate and up-to-date record on that and he explained to me that Mr. Taylor was a very competent bookkeeper and had very accurate records, and he called Mr. Taylor then and asked Mr. Taylor what he thought the stock would run, and Mr. Taylor said, 'Well, approximately somewhere I would say between $90,000 and $95,000. * * * I can get that for you exactly in just a little while'."

Adjuster Smith further testified (p. 2751) that Hyland's adjuster, Sugarman, had submitted to him an inflated claim of loss giving the lot numbers, value and percentage of loss and damage:

"He * * * told me that *Mr. Hyland had made those figures, had made that claim. Yes, that Mr. Hyland made this claim.*"

And again (p. 2754) in his own office with Mr. Hyland, Warner Grove and Sugarman present, just before the filing of the proofs of loss on December 24th:

"I asked Mr. Hyland at that time how he fixed the prices on that schedule. He told me that those were from telegrams that he received quoting prices, and they were in code, and he deciphered them properly. I asked him if he did not think it the proper thing to let me have the key to the telegrams, and let me make comparisons so I would have something to check on; I explained to him at the time that I had been unable to get price verifications from other burlap brokers or from dealers. * * * He told me that those were his private affairs and that was all the information I could have on that subject. I also asked him at

that time if he was satisfied with the grades as well as the prices that he had given me, and he told me that he was and that I would find those were 100% right."

Smith then pleaded with him to present facts as to amounts, grades and prices so that he, Smith, could exercise leniency, give him the benefit of the break and adjust the loss, but he refused to do it. (Tr. p. 2755):

"But he did not do it. I said, 'If you file a proof of loss and you set up incorrect grades or incorrect quantities or incorrect prices and swear that those are the correct prices, you will vitiate your policy contract and by the terms of the contract you might lose all your insurance'. I said, 'I want to warn you of that'. I said, 'I have called Mr. Sugarman's attention to that and I want you to know that I told him about it'. I addressed that conversation to Mr. Hyland. *Mr. Hyland was a little bit peeved at that and said, 'We will take all the chances on that'.* Sugarman said, 'You don't need to worry about that, R. V., we will take all the chances on that, we will attend to that'."

Again (p. 2757) Adjuster Smith talked with Hyland about his physical inventory and his prices. *Smith made a memorandum of the amounts discussed:*

"In the office that day when I called Mr. Hyland's attention to the fact that his book inventory or perpetual inventory very nearly proved the correctness of the physical inventory when it was priced according to its costs—I have here a memorandum of that I would like to refer to;

on the inventory the prices were $86,816.21 and their book inventory or their perpetual inventory as the figures were finally given to me were $88,272.55. That figure had been given to me numerous times. This particular memorandum I made on a pad that day in the office while I was talking, during this conversation I have just related. Mr Hyland said, 'No, I think you are mistaken about that, the values are $102,000, the book values are $102,000.' I said, 'No, you never had any such value as that, that is built up by Hood and Strong method of applying the cost of sales. That has nothing to do with the actual merchandise, that is a fictitious value'. * * * He said, 'You are mistaken about that, Mr. Smith.' I said, 'You call Mr. Taylor and he will tell you that is correct'. So he called Mr. Taylor and Mr. Taylor gave him this figure and Mr. Hyland repeated it to me, $88,272.55. I just kept this memorandum as a reminder of that conversation."

As an illustration of the fact that plaintiff knowingly swore falsely in his proof of loss and testified falsely in the trial, we may take the item of grain bags that were stored at the rear of the third floor. Plaintiff testified at the trial that these bags were damaged by fire and water, having been thrown down and walked on and were one "soggy mess" (Tr. Vol. I p. 239; 479), and in his proof of loss he valued them at $1,078.36 (Tr. Vol. I p. 438, Item 402) and he rated the damage done these bags at 50% (Tr. Vol. I p. 424).

The actual facts were these: These bags were not damaged in any manner whatever. There was no

evidence of any fire in the rear of the third floor. Fire Marshal Kelly made a careful investigation and testified that thread and burlap in machines halfway back were not burned and that in the rear there was no evidence of fire (Tr. Vol. IV pp. 1979-80).

Patrolman George C. Lee testified (Tr. Vol. IV p. 2274) that he personally covered these sacks with tarpaulins while they were still piled up dry and undamaged. Lieut. McCarthy testified to the same effect (p. 2260). Adjuster Smith testified that they were piled up, dry and undamaged and that through mistake the tarpaulins were left on them a day or so after other tarpaulins had been removed, and it was necessary for him to send specially for the Patrol to return and get these tarpaulins (Tr. Vol. V p. 2684). Radford testified that he personally inventoried these sacks after the fire and that they were not damaged in any particular whatever (Tr. Vol. V pp. 2522, 2534). They were inventoried by him as undamaged goods, were not removed from the factory to the warehouse where damaged goods were taken, and in the proof of loss it is admitted that they remained on the third floor at the factory (Tr. Vol. I p. 438, Item 402).

We have not attempted to do other than just cite a few of the instances in which Hyland personally swore falsely. If we took all of the circumstances into account and attempted to cover them all in this brief it would extend it beyond any reasonable size. What we have quoted and cited is ample evidence to sustain the finding of the chancellor that plaintiff intentionally swore falsely to his proof of loss, to his pleadings, and in the trial.

Nor can plaintiff escape the effect of the false swearing of his employees nor of the fact that his employees under his direction supplied him with the figures and kept his books. The plaintiff was in close touch with his business and kept his office at the factory. He was in close touch with his employees and directed them in the compiling of the figures and schedules from which he computed his loss. He personally suppressed and directed them to suppress his cost figures, as shown in the testimony of Adjuster Smith above.

The statement of counsel in the brief that plaintiff knew nothing about his books, never made an entry therein, nor directed one to be made therein, is pure assertion. It was shown that he knew his business thoroughly. As an illustration of the fact that he knew what was going on in his books is shown by his personal approval in his own handwriting of the entries showing the secret commissions paid to Colbert. As we have shown, supra, he denied making such a secret payment to Colbert and it was finally dug out of his books and presented as Defendants' Exhibit JJ, and it reads as follows (Tr. Vol. IV p. 1729):

> " 'Journal Entry Hyland Bag Company No. 4897, San Francisco, Cal., July 25th, 1929. Miscellaneous Revenue, Debit $100.
>
> 'Commission account, Debit $337.50.
>
> 'Accounts Receivable, Geo. P. Colbert, Credit $437.50.
>
> 'Commission, allowed on purchase of 100,000 Calcuttas (H. M. N. Contract # 1194) @ .0075, $75.00.

'Commission allowed on purchase of 350,000 yds. 37/10 (H. M. Newhall contract #1147) @ .0075, $262.50.

'Allowed part of $300 c/M for Inferior 37/10 Burlap H. M. Newhall Contract see Voucher P. N. 1865, $110, Total $437.50

'Note of G. P. Colbert dated 11/19/28 for $300, surrendered to G. P. C. as part payment of above. Balance Paid by P. N. Vo. #1860, 127.17, which is the 137.50 difference between the above credit and note less interest of $10.33 from 11/19 to 7/25 @ 5%.

'Approved Richard C. Hyland.' "

Incidentally, the $250.00 "payroll" payment to Colbert was put in the payroll by Taylor at the suggestion of Hyland's confidential secretary-superintendent, and Taylor testified that it was done to conceal it as it was not contemplated that anyone would look in the payroll for it. He stated (Vol. VI p. 3183):

> "An entry in the payroll account would not be discovered by any other person in the office because that was under my personal control all the time, and nobody else had access to it. * * * Mr. Colbert was never an employee of Mr. Hyland."

An employer cannot escape the consequences of the acts of his employees under such circumstances, and false schedules prepared by them under his direction which he solemnly executes before a notary will constitute false swearing on his part. As said by the Fourth Circuit Court of Appeals in

American Eagle Fire Ins. Co. v. Vaughan, 35 Fed.(2d) 147:

"The ordinary rule is that false swearing by an agent authorized to make proofs of loss will defeat the rights of the insured under the policy, even though the insured be innocent. (26 C. J. 386)."

See also

27 *Corpus Juris,* p. 56;
Mick v. Royal Exch. etc., 91 Atl. 102;
Saidel v. Union Assur. Society, 149 Atl. 78.

And it should be remembered also that the plaintiff in presenting his proof of loss was swearing to facts concerning his merchandise, the amount of it and the value of it, as to which he had intimate information and expert knowledge. In this instance he not only had expert knowledge of his actual cost which he himself could use, but he suppressed and refused to allow the adjuster of the insurance companies to even see his costs.

The Fourth Circuit Court of Appeals in

Orenstein v. Star Ins. Co., 10 Fed.(2d) 754,

puts the proposition plainly as follows:

"The oath as to values in the proofs of loss was not a mere matter of opinion. It was a sworn estimate of value by one having special knowledge of the property made with the intent that the other party, ignorant on the subject, and with unequal means of information should rely upon it to his injury. It appeared that this estimate of value was grossly excessive and the circumstances surrounding the fire were such as to warrant the conclusion that it was wilfully false and fraudulent."

There can be no reasonable doubt in this case that plaintiff intentionally and deliberately swore falsely to his proofs of loss, his pleadings and in his testimony at the trial, and under the policy provision this voided his policy (Tr. Vol. 1 p. 305):

> "This entire policy shall be void * * * (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject matter thereof, whether before or after a loss."

V.

PLAINTIFF COULD NOT INSTITUTE OR MAINTAIN THIS ACTION BECAUSE HE FAILED TO APPOINT A COMPETENT, DISINTERESTED APPRAISER AFTER DEMAND SO TO DO, AND HE AND HIS APPRAISER PREVENTED AN APPRAISAL.

When plaintiff presented his proof of loss the companies were confronted with an exaggerated claim of loss, totaling $73,601.96, which included $15,645.25 for merchandise "burned out of sight."

As the chancellor has found, the defendants were at a peculiar disadvantage. The plaintiff refused to let them see his books and determine his costs, he suppressed the physical inventory taken four days before the fire, and he also suppressed any quotations of burlap prices from other dealers (Tr. Vol. V p. 2812). Adjuster Smith states that Hyland personally refused to give him his cost prices (Tr. Vol. V pp. 2754-5) and that even six months after the fire in April of 1930, Smith did not know what the true values of the stock were; he was simply unable to get

correct prices (Tr. Vol. V p. 2765). He first got a hint of the misgrading still later at the auction sale when so advised by the buyers (Tr. Vol. V p. 2836).

However, defendants were sure that the loss did not exceed approximately 25%; they were sure the total stock was about $88,000.00. The chancellor has found that 75% of the stock was not damaged at all, and that on the remaining 25% (or $22,000.00) substantial salvage would have been realized so that the actual loss was much under $22,000.00

The companies, however, had to act quickly on the proof of loss and therefore they admitted a loss not exceeding $22,733.18 (Tr. Vol. I p. 397).

It is to be noted that this admitted loss is more than the amount of the loss as fixed by the trial court, viz.: $22,000 less salvage on damaged goods. (Adjuster Smith has shown that this net loss was really only $10,171.92 (Tr. Vol. V p. 2723.))

Plaintiff did not accede to this amount, and thereupon these insurance companies demanded an appraisal and appointed William Maris as their appraiser (Vol. I p. 398).

Where this action is taken by the insurer, it is mandatory that an appraisement be had (Tr. Vol. I p. 311) and the California standard form policy allows the assured the right to bring an action thereafter *only* where (Tr. Vol. I p. 312):

> "if for any reason *not attributable to the insured or to the appraiser appointed by him* an appraisement is not had."

He must appoint a "competent and disinterested appraiser" (Tr. Vol. I p. 311) and the two appraisers must select a "competent and disinterested umpire" (Tr. Vol. I p. 312).

The policy further provides (Tr. Vol. I p. 314):

> "TIME FOR COMMENCEMENT OF ACTION. No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured of all the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire."

Plaintiff immediately appointed as his appraiser one George P. Colbert, who was head of the importing department of H. M. Newhall Company, a firm of high standing in this community. Colbert was, as the chancellor finds "ostensibly" a man of high standing in the community. Actually Colbert was a weak, contemptible crook who had allowed himself to get within the grasp of Hyland and was entirely subservient to him. He was in the secret pay of Hyland, receiving secret commissions from Hyland on sales of Newhall Company's goods to Hyland, and after the fire he aided Hyland in perpetrating frauds for the collection of his insurance as we will show. He would not agree to anyone acting as an umpire excepting certain men whom he named who were having business relations with Hyland. Among these was the name of Alexander Logie, who sold a great deal of merchandise to Hyland. Maris objected to these men because of their extensive dealings with Hyland. Colbert categorically refused to consider any of the disinterested men submitted by Maris (Tr. Vol. III p.

1270). However, investigation disclosed that Mr. Logie was a man of peculiarly high character, an expert in burlap and one who could be relied upon to act as umpire without fear or favor, no matter how his decision might affect his personal fortunes. Mr. Maris, the appraiser for the insurance companies, on ascertaining this, then agreed to Logie as umpire.

On learning that Logie was convinced that burlap could not have been burned out of sight in this short flash fire, that was extinguished in a few minutes, Colbert asked Logie to hold up his acceptance until he (Colbert) could "consult" further, and thereafter called Logie up and asked him not to serve.

These insurance companies pleaded the defense that the plaintiff had not appointed in Colbert a competent and disinterested appraiser and had prevented an appraisement and arbitration in accordance with the policy conditions (Tr. Vol. I p. 48).

When the correspondence between the two appraisers was being put in evidence, the chancellor was impatient at first and stated that he would assume that the appraisers simply couldn't agree upon an umpire; that that would not get us anywhere; and that he would assume them "equally to blame" (Tr. Vol. III pp. 1288-89-90).

However, when the evidence was all in, it was so conclusive, that the chancellor found Hyland had failed to select a competent and disinterested appraiser and that by his own actions and those of his appraiser he had prevented an appraisement. The evidence amply supports this finding.

Plaintiff called Colbert as his witness to answer the pleaded defense that a competent and disinterested appraiser had not been appointed. In his direct testimony Colbert maintained that the entire fault lay with Maris in refusing to agree to an appraiser, notwithstanding the admitted fact that his nominee, Logie, had been agreed upon by Maris. Asked on cross-examination if he had not submitted only names of those beholden to Mr. Hyland or himself as umpire, he denied it in toto. On being pressed, he admitted that 50% of them were: "Yes, at least 50%". (Tr. Vol. III pp. 1292-3).

On being pressed further, he denied that he was in the pay of Mr. Hyland. He denied that he received $250.00 from Hyland just prior to the fire (Tr. Vol. III p. 1291).

He was recalled for further cross-examination (Tr. Vol. III p. 1747) and at that time on cross-examination Mr. Colbert broke down and, under oath in open court, confessed his whole nefarious and fraudulent connection with Hyland. He admitted that after the fire he had taken the Newhall Company forms to Hyland at the latter's request and that they had "faked" more than $185,000.00 worth of contracts, supposedly being purchases by Hyland from the Newhall Company, dated some months prior and for delivery immediately following the fire. Colbert signed these for Newhall Company, although he did not have the authority to do so (p. 1753). The contracts were then cancelled. These contracts were used by Hyland to show an exaggerated loss in his arbitration under his use and

occupancy policies of insurance, he claiming that it was necessary for him to cancel $185,000.00 worth of business on account of the fire.

During the course of this trial defendants had demanded these contracts, and plaintiff had given as his excuse that he "could not find them."

Colbert confessed that Hyland had told him that he had these contracts during the course of the present trial but that they did not show high enough price, and he wanted them rewritten. Showing the control Hyland had over Colbert, after the beginning of the trial in this case, two years after the fire, he forced Colbert to bring over to him some more of the Newhall Company contract blanks and new contracts were entered into, being identical with the former fictitious contracts but with a difference in the price. (Tr. Vol. IV pp. 1765-6; 1800 to 1804). Hyland denied this, but the trial judge has stated specifically, "I believe Colbert's testimony as to this transaction". (Tr. Vol. I p. 200).

Mr. Logie testified that after he had been accepted as an umpire and he had told Colbert he did not think there was any out of sight loss,

> "Mr. Colbert replied that he was required to consult in regard to that, and that later on in the day he phoned and told me that I had not been served." (Tr. Vol. IV p. 2162).

And again, on the same page:

> "I had a conversation with Mr. Colbert on a Monday morning (following the fire) and nat-

urally the question of the Hyland Bag Company fire was adverted to, and I was requested not to give out any prices if I was called upon by anyone to give prices on burlap bags."

It was shown from the books of the plaintiff that Colbert was on the payroll of plaintiff for $250.00 for the month preceding the fire (Tr. Vol. VI p. 3181) and that he had received other emoluments from plaintiff in the way of secret commissions amounting to as much as three-fourths of a cent on hundreds of thousands of yards of burlap sold to plaintiff by H. M. Newhall Company and *that that particular transaction was oked in the book by plaintiff personally* (Tr. Vol. IV p. 1729).

It is no wonder that in the face of this accumulation of testimony, the truth of which could not be doubted, the chancellor changed his attitude from one of indifference towards this issue and made a flat finding of fact that the plaintiff had wilfully and deliberately prevented by his own actions, and by those of his appraiser, the appraisement of this loss and therefore could not maintain this action on the policy, it being a condition precedent to the bringing of the action that he appoint a competent and disinterested appraiser to effect an appraisement, and further that the failure to have an appraisement be not due to the actions of the insured or his appraiser.

Old Sausalito Land Co. v. Union Ins. Co., 66 Cal. 253;

Carroll v. Girard Fire Ins. Co., 72 Cal. 297.

In the *Sausalito etc. case,* supra, it is said:

> "It is the clear meaning of the contract that if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, *or a fair effort on the part of the assured* to obtain it, no cause of action arose." (Italics ours.)

Appellant claims that the Logie incident occurred after the ninety day period for an appraisement and that therefore, technically, there was no violation of this portion of the policy.

But this is overlooking the fact that Colbert refused to agree to any umpires prior to the expiration of the ninety day period. He refused to agree to men who were entirely disinterested in his letter of February 19, 1930 (Tr. Vol. III p. 1268) or to the many other men of undoubted high standing and disinterest in the case submitted prior to March 25th (Tr. Vol. III p 1273). Colbert would never agree to any of these. In his letter of March 28th Maris stated to Colbert, first as to Colbert's nominees then as to his own as follows (Tr. Vol. III p. 1273):

> "Each of these gentlemen is in some way naturally looking for favors from Hyland or else is beholden to Hyland or your firm of H. M. Newhall Company for favors done them in the past. It would naturally be embarrassing for any of these gentlemen under these circumstances to be compelled to give an opinion that would be unsatisfactory to their friends so deeply interested. I presented to you for consideration the follow-

> ing names as prospective umpires. * * * *When you took a memorandum of these names you told me you would look them up and advise me as to your decision within a few days, but I have not heard from you since."*

Colbert didn't even reply to this letter until April 5th (Tr. Vol. III p. 1274) and then he did not reply to the query as to whether he would or would not accept any of these names, but he suggested some further names. Again, on April 9th (Tr. Vol. III p. 1276) Colbert wrote that he was unable to agree to one particular man, but makes no comment as to the others.

Finally, on April 12th, *Maris accepted Alexander Logie as a "competent and disinterested appraiser."*

Then it was that Colbert suggested to Mr. Logie that he had better not serve.

The evidence is clear that Colbert absolutely would not nominate or consider any disinterested man as an umpire. He would not even allow his own nominee to have an honest opinion but insisted on his withdrawing after he had been accepted. The utter insincerity of Colbert in the light of this record is shown by three more excerpts, the first from his letter to Maris of April 21st (Vol. III p. 1280). He there said:

> "It gives me great pleasure to have you find out after interviewing Mr. Alexander Logie, one of the gentlemen suggested by me, that he was in no way beholden to Mr. Hyland and *would give a fair and unbiased decision in the case. It is indeed regrettable that Mr. Logie found it neces-*

sary to decline to act as he would have been a very capable and just umpire.''

Colbert thus admits that Logie was fully qualified, honest and unbiased and yet, when Logie was accepted Colbert procured his declination to serve and then "regrets" that Logie was unable to serve. Next, when pressed on cross-examination as to his nominating only those beholden to Hyland, he first denied this and then admitted it, stating (Vol. III p. 1292):

> "No, it is not a fact that relative to the names of the gentlemen whom I submitted to Mr. Maris for consideration that nearly every one of those gentlemen was in some way carrying on business with Mr. Hyland, some of them were and some were not. *No, I would not say most of them were, I would say about fifty-fifty.* * * * (page 1293) "Yes, *at least* 50% did have".

And again, on page 1292:

> "Mr. Maris finally agreed to Mr. Logie after turning him down first, and *I am of the opinion that he agreed to him because he knew that Mr. Logie would not act;* he was merely making a gesture that he was agreeing to one of my appointees. *Yes, that was my opinion. I am of the opinion* that he had a discussion with Mr. Logie and found out that Mr. Logie was not interested in acting in that capacity or he probably in some way found out from some other source that Mr. Logie would not act."

This testimony from Colbert ! the very man who had prevented Logie from acting because Logie in-

sisted on following his own honest and unbiased opinion as an umpire. He was of the "opinion" that Maris knew Logie wouldn't act! Could Maris possibly have known that Colbert would suggest to his own nominee that he not act?

The finding of the trial court is that Colbert would never at any time agree to a disinterested and competent umpire exactly as Maris stated the fact to be in his letters; it is amply sustained. The further fact that Colbert was only interested in getting an umpire appointed who was in some way beholden to the appellant is confirmed by his own statement that "at least" 50% of his nominees were of that caliber. Even Mr. Logie sold a great deal of goods to the plaintiff, and he was only accepted by Mr. Maris because of his peculiar traits of character and his high qualification as a burlap expert, which Colbert admitted was "second to none on the Pacific Coast" (p. 1272).

Appellant finally contends that the appointment of a competent and disinterested appraiser was not an issue in the case. This is directly contrary to the pleading where it is set up as an issue that the plaintiff personally and in conjunction with his appraiser prevented an appraisement (Tr. Vol. I pp. 48-9; 63-4).

It was further accepted as an issue by plaintiff at the time of the trial (Tr. Vol. III p. 1287). Plaintiff's counsel admitted that there was such an issue, and on page 1288 states that he was meeting the issue by presenting the testimony of Colbert, and counsel for the primary companies there stated as the ground of his cross-examination of such testimony (p. 1289):

> "In the event of failure due to the plaintiff, after it has been demanded, to select a competent and disinterested appraiser, he has failed to comply with the policy and he may not bring suit until that is done."

The opinion of the chancellor was (Tr. Vol. I p. 197):

> "The vice in appointing Colbert lay in the fact that his connection with plaintiff was secret and tainted with fraud."

He was (p. 198):

> "a bribed employee of a firm with which he had extensive dealings. * * * plaintiff used Colbert as a took in his attempt to get an excessive award for his losses at the U. & O. hearing."

And, again (p. 202):

> "The whole course of Colbert's dealings with the appraiser appointed by the insurance companies was designed to defeat an appraisement of the loss according to the terms of the policy."

The finding of the trial court is not based upon one incident. It is based upon the whole course of the conduct of Colbert prior to the fire and after the fire and while acting as an appraiser appointed by the plaintiff. This course of conduct by Colbert was insincere, untruthful, fraudulent and designed to prevent an honest appraisement, although in his letters he was careful to state that he was anxious for an early appraisal.

The contention that the appraisement was not necessary because an auction sale was later held to determine the value of the merchandise is puerile; and it is reprehensible in that it is an attempt to deceive this court as to the facts of the case. This auction was held more than six months after the fire, and approximately six months after the crash of the stock market in the depression, with the result that the prices of burlap were greatly reduced at the time the auction was held. Burlap was then a drug on the market.

An appraisement would have fixed the price as of the time of the fire. This amount of the loss figured at correct grades and prices as of the time of the fire is shown by Exhibit TTT (the percentage of damaged stock) (Tr. Vol. V p. 2710) and Exhibit UUU (the amount of the loss) to be $10,171.92 (Tr. Vol. V p. 2723).

The plaintiff, having failed to comply with condition precedent of his policies, cannot maintain this action against these defendants.

VI.

FALSE SWEARING WAS NOT WAIVED.

Appellant climaxes his grievances against the findings by the chancellor that he was guilty of fraud and false swearing in his proofs of loss by the technical contention that such false swearing was waived and that the trial court should have so found.

This argument is one of "confession and avoidance". In other words, he admits that he was guilty

of false swearing and that the court should have so found but that the court should have found that it was waived by the defendants! What a plea to address to the conscience of a court of equity.

But, actually, even as a technical argument it has no merit. In the first place, in order for an insurance company to waive any provision in its policy, it is fundamental that the insurance company must first have knowledge of the facts and then, with knowledge of the facts, waive the penalty (14 *R. C. L.* 1142).

Plaintiff at no time communicated to the defendants that he was swearing falsely. The defendants knew that the amount claimed was not correct but they did not at that time know just what the correct values were, and did not know the exact amount of the loss. The chancellor has found that the plaintiff suppressed his cost prices, suppressed the physical inventory taken four days before the fire, and suppressed quotations from other dealers. Adjuster Smith states that Hyland refused to give him his cost prices (Tr. Vol. V pp. 2754-5), and that he had not been able to ascertain the correct prices up to April of 1930, six months after the fire.

> "I had some prices that were less than the prices Mr. Hyland had quoted but they still were not the true prices". (Tr. Vol. V p. 2765).

It is certainly a strange argument for a plaintiff to contend that, because he had concealed prices and kept the true prices from the defendants, that the defendants have waived the fact of his false swearing. Merely to state the proposition is to answer it.

Secondly, the claim that by demanding an appraisement the insurance companies waived false swearing is negatived by the provisions of the policy itself. The California standard form policy provides (Tr. Vol. I p. 313):

> "NON-WAIVER BY APPRAISAL OR EXAMINATION. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage, or by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for."

Singleton v. Hartford Fire Ins. Co., 105 Cal. App. 320.

Thirdly, the claim that plaintiff's false swearing in the proofs was waived because formal objection was not made to it when objection was made to the proof of loss, is likewise without merit. Not only is it specifically provided in the policy, as quoted in the preceding paragraph, that assent to the amount of loss or damage as stated in the proof of loss shall not waive the other provisions of the policy, but the policy further provides that the assent or objection to the proofs shall be as to the amount contained in the proof of loss and not as to the other provisions of the policy (Tr. Vol. I p. 311).

Fourthly, the present suit is not on the proof of loss that was objected to by the insurance companies. Plaintiff abandoned his proof of loss, which was for $73,000.00, and filed suit for $76,000.00 which he then amended to claim a loss of $106,000.00. At the

beginning of the trial he again stated that he would raise the claim, this time to $107,000.00.

The chancellor has found, and the evidence amply sustains his findings, that not only was plaintiff guilty of false swearing in the original proof of loss, but he also was guilty of false swearing in these several pleadings. There could have been no waiver by the insurance company of this false swearing in the pleadings under any theory. It was immediately set up as a special defense in the answers (Tr. Vol. I p. 45). There was in fact no such waiver, nor was there any evidence of such a waiver. Plaintiff never even put any such theory of waiver in issue.

And, finally, the chancellor has found that plaintiff was guilty of false swearing at the trial. Here again we see that it is obvious that there could have been no waiver of his false swearing at the trial; no claim was made that it was waived and plaintiff did not make any issue of such a claim.

This specious technical argument of appellant illustrates very well the utter lack of any merit to this appeal.

VII.

POLICY COVERAGE.

There were certain policy coverage questions which the chancellor outlined but did not pass on due to the fact that he found plaintiff was not entitled to make a recovery (Tr. Vol. I p. 175). As this case is one in equity and the appellate court may consider it *de novo,* we will briefly present the status of the policies.

A. The Western Insurance Company of America policy attached when the values of the stock were in excess of $50,000.00 and having attached, it contributed on any loss resulting.

The policy of the Western Insurance Company of America is set out in the transcript (Vol. I p. 341) and is for $50,000.00. It is a California standard form fire insurance policy.

In this respect it is the same as the so-called primary policies on which the companies represented in this brief had insured appellant in the amount of $32,500.00, there being one other company with primary insurance of $17,500.00, a total of $50,000.00 primary insurance in effect when the Western policy was written.

The Western Insurance Company policy had the provision (Tr. Vol. I p. 343):

> "The amount of insurance under this policy is provisional and attached at all times in excess of $50,000.00. It is understood and agreed that this insurance shall attach only to the extent of the difference between the amount of all other specific insurance upon the property described herein and 90% of the actual cash value thereof; and the amount so arrived at *shall be the basis of contribution* with all other insurance in the event of loss, but in no event shall the liability of this company exceed the amount for which this policy is written. If, in the event of loss, claim does not exceed $50,000.00, it is understood and agreed that there shall be no insurance *effective* hereunder."

And again (p. 346):

"It is expressly stipulated and made a condition of the contract that, in the event of loss, this company shall be liable for no greater proportion thereof than 90% of the amount hereby insured bears to 90% of the actual value of the property described herein at the time when such loss shall happen, for nor more than the proportion which this policy bears to the total insurance thereon. In the event that the aggregate claim for any loss is both *less than $5,000.00* and less than 2% of the total amount of insurance upon the property described herein at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required.

It is agreed that 10% of the insurance under this policy constitutes excess insurance only and such excess insurance shall not be called upon to pay any loss until such loss exceeds 90% of the value of the property covered at the time of the fire, and then for such excess over 90% of the value of the property in the locations herein described. No claim shall be made under excess ininsurance until all other insurance has first been exhausted."

And again (p. 349):

"In this endorsement 'other insurance' shall mean 'insurance contributing herewith other than that provided by this policy, whether valid or not and whether the same be provided by solvent or insolvent insurers.' "

It is obvious at once from the above that these provisions of this particular policy are not only ambiguous but are in conflict with each other. It is quite clear that the policy did not attach until the values of the stock were more than $50,000.00. But it is also, we submit, clear that there was no failure of the policy to attach merely because the claim did not exceed $50,000.00. The policy was in effect, irrespective of whether a claim is made or not, and thus being "effective" it must be held to be a policy of insurance on which the insured could collect in event of loss.

The third paragraph quoted above indicates quite clearly that the company intended to be bound as a *contributing company,* even on the smallest loss, providing the policy had attached on values of more than $50,000.00, otherwise there would have been no need for the provision respecting claims of under $5,000.00.

In the last paragraph the only portion of the policy which constitutes excess insurance is the 10% clause.

That this must be so is shown when we analyze what would be the situation if a loss occurred. At the time that the Western policy was issued there was $50,000.00 of primary insurance in effect. The $50,000.00 of insurance under the Western attaching when the values exceed $50,000.00 made the total insurance in effect $100,000.00. Suppose there was a $10,000.00 loss under these policies (at that time there were no policies issued by the National Liberty). Now on a loss of $10,000.00, under the primary policies there would be the elimination of the 10% co-insurance. The same applies to the Western. In other

words, there would be effective $90,000.00 of insurance. The primary companies would aggregate, therefore a net of $45,000.00 of insurance and they would pay on the loss only the proportion that their insurance bore to the total amount of insurance in effect, that is, 45/90ths, or one-half. One-half of the loss of $10,000.00 would therefore be $5,000.00. The only way for the insured to be paid the remaining amount of his loss would be to construe the Western Insurance Company policy as liable to pay the remaining portion of it. Otherwise, the insured would have paid for $90,000.00 of net insurance, have a loss of $10,000.00 and receive only $5,000.00 on account thereof. It cannot be assumed that any such bizarre result was intended.

The ambiguity in the Western Insurance Company policy must be construed against it and it be held that the Western policy attached when the values exceeded $50,000.00 and that it thereafter became a contributing company the same as the primary companies. This was the understanding of Mr. McLaren of the Western Insurance Company, who executed this policy. Mr. McLaren said that when an excess policy attaches, it becomes then a contributing policy the same as the primary companies (Tr. Vol. III pp. 1149-50); that while they might "try to get away with it" there are "two sides" to it. (p 1145).

In view of the ambiguity in the endorsement, it certainly should be construed as a contributing policy, the values being in excess of $50,000.00 and the West-

ern Insurance Company policy having therefore attached. The rule is fundamental that where the policy is ambiguous it will be construed against the insurer.

B. The National Liberty Insurance Company policy was primary insurance and not excess.

The National Liberty Insurance Company policy was taken out shortly before the fire and was in the form of written cover notes for $15,000.00 and $70,000.00, but the policies had not yet been issued (Tr. Vol. I pp. 350-3; Exhibits Nos. 37, 38 and 39).

Where a cover note is issued, it is presumed to be the California standard form policy (Tr. Vol. I p. 350) which would constitute a primary and not an excess coverage. The cover note specifically states that it will be

> "subject to the printed conditions of the standard fire insurance policy of the state."

In addition to that, the California Political Code provides (Section 633 (b)):

> "This section shall not be construed to prohibit the use of cover notes to temporarily bind insurance or surety bonds pending the issuance of the policy or contract; provided, that for every such covering note so used, within ninety days thereafter a policy or contract shall be issued in lieu thereof, including within its terms the *identical insurance protected under said covering note* and premium consideration paid or to be paid therefor."

Fire coverage in California is presumed to be in accordance with the statutory form of policy coverage.

Northern Ins. Co. v. National Union Fire Ins. Co., 35 Cal. App. 481;

Law v. Northern Assur. Co., 165 Cal. 395 at p. 401;

Jones v. International Ind. Co., 39 Cal. App. 706 at p. 709.

As stated in

1 *Couch on Insurance,* p. 163:

"A binding receipt or slip in such case ordinarily being a document given to the insured, which binds the insurance company to pay insurance should a loss occur pending action upon the application and actual issuance of a policy, and containing the terms and conditions expressly agreed on, or, in the absence of express agreement, the terms and conditions of the policy ordinarily used by the company to insure like risks."

The National Liberty claimed that they did not intend to write a primary policy but only an excess policy attaching to values over $100,000.00, and have sought to reform their policy.

There are three objections to reformation. First, the proof adduced does not show that there was any "mutual mistake"; *second,* in the policy issued after the fire, (which was not accepted) coverage was purported by its terms to attach when values exceeded $100,000.00 and *then it became a contributing policy for any claim* (Tr. Vol. VI pp. 2988; 2993); *third,* in

its pleadings (Tr. Vol. I p. 70) the claim is made that the understanding was that the covering note would attach only where the value exceeded $100,000.00, and then only for the amount of the excess of such value over and above such sum of $100,000.00. In other words, that the loss would have to exceed $100,000.00 before there would be any contribution to the loss.

It is apparent at once that not only is this showing far from showing a mutual mistake between the parties, but it shows that the National Liberty Insurance Company didn't have a definite idea itself what the coverage was. The policy issued *after the fire* didn't even contain the limitation now sought by reformation.

There must be a clear, unequivocal showing of facts of a mutual mistake before a reformation of a policy will be decreed; it must not be a mere preponderance; it must be clear and unmistakable in character so as to produce complete satisfaction in the mind of the court.

Philippine Sugar Co. v. Government of Philippines, 247 U. S. 385; 38 S. Ct. 513; 62 Law Ed. 1170;

Rogers v. Jones, 40 Fed. (2d) 333 (10 C. C. A.);

Clarksburg Trust Co. v. Commercial Cas. Ins. Co., 40 Fed. (2d) 626 at 634;

Skelton v. Federal Surety, 15 Fed. (2d) 756 (8 C. C. A.).

The coverage of the policies therefore should be as follows: First, $50,000.00 of primary insurance in which the policies had been issued by six companies.

Second, $85,000.00 of primary insurance in covering notes by National Liberty Insurance Company; third, $50,000.00 of excess insurance of the Western Insurance Company of America which did attach as the values were more than $50,000.00, and it then became a contributing policy the same as the primary policies.

We have submitted the above only because it is an issue in the case. We believe the case will be properly and correctly determined by an affirmance of the decree of the chancellor, and that it will not be necessary for the court to further analyze the question of policy coverage. We therefore respectfully submit that the decree of the lower court should be affirmed.

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